UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

LOCAL 917, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

AND **CASE 29-CE-128**

PEERLESS IMPORTERS, INC.

Rachel Zweighaft Esq., Counsel for the General Counsel
Allen B. Roberts, Esq. and Donald B. Krueger, Esq., Counsel for the Charging Party
Gene M. J. Szuflita, Esq., Counsel for the Union

DECISION

Raymond P. Green, Administrative Law Judge. I opened and closed this hearing on March 8, 2005 without taking testimony. In essence, I decided to dismiss this case when the Charging Party's counsel refused to turn over an unredacted copy of a document subpoenaed by Local 917, International Brotherhood of Teamsters after I had denied a Petition to Revoke. I am going to dismiss the Complaint because I believe that the document in question could possibly be relevant to the only defense that the Respondent could make in this case and therefore, its nondisclosure would be prejudicial to the Respondent's right to a fair trial.

The charge was filed by Peerless Importers Inc. on October 6, 2004 and the Complaint was issued on December 30, 2004. In substance the Complaints alleged:

1. That Peerless, located at 16 Bridgewater Street, Brooklyn, New York is engaged in the distribution of alcoholic beverages.

2. That Diageo North America Inc., located at 450 Park Ave. South, New York, New York, is engaged in the wholesale distribution of alcoholic beverages.

3. That on or about May 17, 2004, Peerless and the Union entered into an agreement retroactive to November 11, 2002 that states:

> 3.27. Scope of Agreement. The handling of all railroad shipments, whether it be piggy back, tractor-trailer, flexi-van, or any other type of railroad conveyance, and those of freight consolidators and car loading companies, and freight brought via water or water borne, fish-back or birdy-back, originating elsewhere and terminating anywhere within Kings County, New York County, Bronx, Queens, Nassau and Suffolk Counties, bounded roughly by a line starting on the North Shore of Port Jefferson and running southward through Coram in the middle and on down to Patchogue on the South Shore, and in Staten Island and within a radius of fifty miles into the State of New Jersey, must be done by employees

covered by this Agreement.

3.28. The unloading, loading and transportation of merchandise at freight depots, domestic and foreign, has been and continues to be unit work within the scope of this Agreement. All freight consigned to wine and whisky wholesalers, distributors, distillers, rectifiers or other processors or receivers of same, under contract to the Union, shall be handled and hauled from anywhere within the areas mentioned above to the Employer's receiving and shipping premises in accordance with the following stipulations and conditions, provided, however, if the Employer, at its option, assigns at least two employees as regular platform workers, the employer shall not be required to employee drivers and helpers for each outside vehicle.

3.29. Merchandise shipped from anywhere within the Continental United States or its Possessions, including Puerto Rico, whether by steamship, steamship container, or steamship van, piggyback, fishy-back, birdy-back, railroad car or van, shall come to rest somewhere with the areas mentioned above, there to be handled and transported to the wholesaler by employees covered by this Agreement.

3.30. The Employer shall transport all such merchandise arriving in above named conveyances with its own equipment and with a chauffeur and helper from the seniority list assigned to each truck. The chauffeur must remain with the load he or she has picked up until it is fully unloaded.

3.31 Merchandise in foreign commerce from other countries or commonwealths, arriving at ports in the United States or arriving at foreign ports and subsequently shipped here, whether loaded in vans, containers, tanks or other conveyances and all consignments of wines and liquors, or part thereof, when arriving or conveyed in barrels, casks, hogshead, pipes, tanks, or other type bulk liquor carrier, whether originating domestically or imported, shall be unloaded and/or transported wholly in the state of its arrival, by chauffeurs and helpers covered under the Agreement. Pier and piggyback may exceed six hundred cases.

4. That starting in or about April 2003, Diageo began making delivers of alcoholic beverages directly to the Employer's Brooklyn facility.[1]

5. That in or about November 2003, the Respondent attempted to apply the provisions of the agreement to the deliveries made by Diageo by filing a grievance alleging that Peerless was violating the agreement by allowing Diageo to make deliveries of alcoholic beverages directly to the Brooklyn facility.

6. That on or about June 28, 2003, the Union took the aforesaid grievance to arbitration thereby entering into and reaffirming the agreement described above. This agreement, as applied, is alleged to violate Section 8(e) of the Act.

The Complaint alleges, the Answer admits and I find that the Charging Party is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. The Answer also admits and I find that the Union is a labor organization within the meaning of

[1] At the opening of the hearing, the General Counsel amended this allegation to change the date from October 2003 to April 2003.

Section 2(5) of the Act.

I received into evidence as General Counsel Exhibit 2, an Opinion and Award issued on September 28, 2004 by arbitrator Richard Adelman. That Award was issued after he held a hearing on June 28, 2004. In that forum, in which both parties were represented by counsel and had the opportunity to present evidence, Peerless contended that the decision to have the deliveries made by Diageo's drivers was not within Peerless' control and/or that the provisions that the Union were seeking to enforce were violative of Section 8(e) of the National Labor Relations Act. As to the 8(e) argument, the arbitrator noted that the Company had not filed an 8(e) charge with the NLRB and that although he would have no hesitancy in ruling on that question if the Board had deferred its own proceedings to arbitration, that was not the case here. He also stated:

> Moreover, assuming that the Company's reading of the law regarding the meaning of the "right of control" test is correct, the Company, by not submitting its agreement with Diageo into evidence, failed to establish that Diageo had control over the work at issue. In addition, as stated above, the Company was aware of the terms of the agreement with the Union at the time it contracted with Diageo, yet the Company did not notify the Union of the arrangement it was making with Diageo. In short, although the Arbitrator finds that the Company violated the Agreement, it is not clear whether or not the Company had the requisite control over the work, or whether or not other factors should be considered in determining if Section 8(e) has been violated, decisions that should be made by the NLRB.[2]

The General Counsel asserted in her opening statement that she was not claiming that the clauses referred to above, taken separately or together, violated Section 8(e) of the Act on their face. That is, she concedes that the clauses could be interpreted, in the appropriate circumstances, as having a valid work preservation object. Her contention is that in the present circumstances, the Union asked the arbitrator to enforce the clause in an unlawful way because the work claimed (certain truck driving) was work "not within the control" of Peerless and therefore was not work that could be "preserved."

The legal principles in these types of cases are as follows. In cases involving Section 8(e), the General Counsel alleges that a contract between a union and a company employing individuals represented by the Union has entered into an agreement whereby the Company has agreed not to do business with any other person with whom the Union has a primary dispute. In those circumstances, if such an agreement, either on its face or in its specific application, is used to prevent an employer or person with whom the Union has no primary dispute to cease doing business with another employer with whom the union does have a primary dispute, then the agreement is deemed to have a secondary objective and constitutes a violation of Section 8(e) of the Act. In such circumstances, the Employer having the collective bargaining agreement with the Union is described as being an "unoffending neutral."

Inasmuch as the agreement was made more than 6 months prior to the filing of the charge, the General Counsel must show that it was reaffirmed within the 10(b) statute of limitations period. Board cases have held that this test can be met by showing that the union has filed a grievance and taken a case to arbitration to enforce the contractual provisions, not

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[2] One wonders what impact, if any, the Board's *Speilberg* doctrine would have on this type of case if the arbitrator applied the applicable law and made fact findings that were not clearly erroneous.

for a work preservation objective, but to compel the contracting employer to cease doing business with another employer or person. *Elevator Constructors (Long Elevator*), 289 NLRB 1095, (1988).[3]

Faced with this type of charge, a union typically argues that the attacked clause does not have a secondary objective and that it merely is designed to preserve the work of the bargaining unit employees covered by the collective bargaining agreement within which the alleged offending clauses reside. In this case, the Union contends that it has a contract with Peerless that covers the wages, hours and working conditions of truck drivers who are employed by Peerless. It contends, and that facts no doubt would confirm, that for years, Peerless truck drivers have uniformly had the assignment of picking up beverages from Diageo's facility and delivering them to its own warehouse. Therefore, the Union asserts that **(a)** this type of delivery work is clearly bargaining unit work; **(b)** that the Union is merely seeking to preserve that work for the employees it represents; and **(c)** that it therefore has a "primary" dispute with Peerless and not with Diageo. In seeking to enforce its contract with Peerless, the Union contends that it merely is trying to enforce the bargain it made with Peerless to preserve bargaining unit work.

The General Counsel responds to this argument by contending that although the clauses in question may very well have a preservation of work objective, its enforcement *in this case* would have a secondary objective because in this case Diageo made the decision to have the deliveries reassigned from Peerless' drivers to its own drivers. She therefore argues that when this happened in April 2003, Peerless no longer had the "right to control" regarding the assignment of this work. Arguing that Peerless, having lost the right of control, the General Counsel contends that enforcement of the clauses in question cannot have a primary work preservation objective because Peerless no longer had the work to be preserved. That is, even if Peerless wanted to, it could not assign the work to its own drivers. The leading case dealing with the distinction between lawful work preservation clauses versus unlawful secondary hot cargo clauses is *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967).

Of course every thrust has its riposte and the Union argues that if it turns out that Peerless had a role with Diageo in making the decision to have the work reassigned from its own drivers to the drivers of Diageo, (perhaps in order to reduce its own costs), then Peerless would not be an innocent party to this transaction and therefore the General Counsel would not have the right to argue that Peerless did not have the "right of control."[4] The Union was not

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[3] I should note here that the Board in this case also held that an 8(e) finding based on the filing for arbitration would not be inconsistent with the holding of *Bill Johnson's Restaurant*. The Board stated:

> Because we have concluded that the contract clause as construed by the Respondent would violate Section 8(e), we may properly find the pursuit of the grievance coercive, notwithstanding the Supreme Court's decision in *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983). Although holding that the Board could not enjoin, as an unfair labor practice, the lawsuit at issue in that case, the Court expressly noted that it was not dealing with a "suit that has an objective that is illegal under federal law." 461 U.S. at 737, fn 5. See also *Teamsters Local 705 v. NLRB (Emery Air Freight*), 820 F.2d 448 (D.C. Cir. 1987) (distinguishing between having an unlawful motive in bringing a lawsuit and seeking to enforce an unlawful contract provision).

[4] It is hypothetical but entirely possible that in seeking to obtain the contract from Diageo, Peerless overbid on its pricing and found itself burdened by an inflated cost structure. In that case, it is again hypothetical but possible that the solution could have been for the parties to

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privy to the negotiations between Diageo and Peerless that led up to either the original Distribution Agreement or to a change in what appears to have been a long standing practice in the way that deliveries were made from one to the other. (According to the arbitrator, the Union was not even given advance notice of the change). And since the Union does not have access, in a Board proceeding, to any form of pre-trial discovery, it subpoenaed certain information from Peerless, (returnable on the date of the hearing), no doubt hoping that such documents, in conjunction with skillful cross examination and a little bit of luck, would show that Peerless was not an "unoffending neutral." Quite frankly, under the existing view of the law, this would be the Union's only available legal defense. See for example *Painters District Council No. 20 (Uni-Coat Spray Painting Inc.*), 185 NLRB 930 (1970).

Prior to the opening of the hearing, the Union's counsel subpoenaed documents from the Charging Party. Schedule A of the subpoena lists the documents as:

> 1. All documents and any materials that relate to Peerless' use of non-unit personnel to move freight including, but no limited to, any contracts or agreements with Diageo North America, Inc.
>
> 2. All documents relating to meetings or discussions with Diageo North America Inc. concerning the movement of freight.

On March 1, 2005, Peerless filed a Petition to Revoke the subpoena, albeit it did offer to produce "a copy of relevant portions of the Distribution Agreement, [between Diageo and Peerless], redacted to preserve non-relevant Confidential Information, at such time and such form as directed…" Peerless further stated that it would provide a document which included a PowerPoint presentation entitled "Peerless Delivered Pricing Operational Preview."

On March 7, 2005, I issued an Order indicating that I would reserve ruling on the Petition until after the opening statements in the case. I also stated:

> In this regard, the parties should be advised that once this case becomes a matter of public record by way of a trial, any contention that any documents or information is or should be considered confidential is viewed with great skepticism by me. Therefore, Peerless should bring to the hearing the entire contents of the documents subpoenaed and be prepared to present them to me in camera without any redactions.

Soon after the opening of the hearing, the subpoena issue was revisited. And after a couple of hours of discussion, Peerless' counsel obtained, via fax, an unredacted version of the 2002 Distribution Agreement between it and Diageo. The unredacted version was shown to me along with the redacted version. A redacted version was shown to the Respondent's counsel. From statements by Peerless' counsel and based on a review, it appears that this document is a contract between Diageo and Peerless whereby Peerless became, after winning a bid between itself and another local distributor, the exclusive distributor or alcoholic beverages imported or handled by Diageo for a region encompassing New York City and environs. It is a 30 plus page document requiring certain sizeable payments by Peerless to Diageo and requiring certain payments in the event that either wants to terminate the agreement. The redacted version

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have agreed that Diageo would undertake the costs of deliveries, by having its own drivers do the work and thereby mitigate Peerless' cost structure by eliminating that expense from Peerless.

eliminated some paragraphs and blackened out some of the numbers and percentages set forth in various sections of the agreement. There was nothing in the unredacted version of the document that struck me as being sufficiently confidential so as to warrant nondisclosure. Indeed, the General Counsel did not argue that there was any confidential information in the unredacted version of the agreement. (The document does not contain trade secrets such as formulas, patents etc. and does not, as far as I can see, disclose the types of commercial information, such as customer lists, that might normally be described as confidential). Moreover, there did not seem to be anything in the document that talked about whose drivers would make the deliveries from Diageo to Peerless.

Concluding that the Union was entitled to review any and all documents relating to the relationship between Diageo and Peerless concerning the sale and/or delivery of alcoholic beverages from 2002, I directed Counsel for Peerless to turn over the unredacted version of the Agreement. I did so not because I thought that this document would necessarily be decisive in proving either side's case, but because I felt that it was arguably relevant to the Union's defense and that it might lead to other information that could be useful. *Brinks Incorporated*, 281 NLRB 468 (1986); *Perdue Farms, Inc.,* 323 NLRB 345, 348 (1997) enfd., *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830 (D.C. Cir. 1998) (information need only be "reasonably relevant"). I do not know enough about this industry to determine if the redacted information could be relevant to the issues in this case, but since I don't believe that they are sufficiently confidential, I can see no reason to permit their nondisclosure.

Notwithstanding my Order, Peerless decided to not turn over the unredacted version of the document to the Union and took back all of the distributed redacted versions. Although I suggested that Counsel for Peerless might want to make the redacted version an exhibit in the case in order to preserve the record, Counsel chose not to do so. Despite my previous warnings, I thereupon closed the hearing and stated that I would dismiss the Complaint because the Charging Party's attorneys decided to not turn over information that could possibly be used by the Union in support of its defense.[5]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[6]

ORDER

The Complaint is dismissed.

Dated, Washington, D.C.

Raymond P. Green
Administrative Law Judge

[5] Earlier, the Charging Party's counsel asked for a protective order in relation to the documents. I decided that such an order would not be appropriate inasmuch as I do not have the power to hold the other counsels in contempt in the event that there is noncompliance. In short, I see no point in issuing orders that cannot be enforced.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.